

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Updating Part 1 Competitive Bidding Rules)	WT Docket No. 14-170
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Petition of DIRECTV Group, Inc. and)	RM-11395
EchoStar LLC for Expedited Rulemaking to)	
Amend Section 1.2105(a)(2)(xi) and 1.2106(a))	
of the Commission's Rules and/or for Interim)	
Conditional Waiver)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	

**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION OF
THE BLOOSTON RURAL CARRIERS**

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Summary

The Blooston Rural Carriers hereby petition for clarification and/or reconsideration of the Commission's Report and Order, FCC 15-80, released July 21, 2015, in the captioned proceeding (the "DE Report and Order"), and the wording of new Rule Section 1.2105 (a)(2)(iii), which appears to adopt a bright line prohibition on any person serving as an authorized bidder for more than one auction applicant. This "exclusive bidder" prohibition is overly broad because it would prohibit an individual attorney from serving as an authorized bidder for multiple clients even when those applicants are not affiliated, share no common ownership, and are not qualified to bid for licenses in the same or overlapping geographic areas, therefore *posing no threat of collusion or other anti-competitive harm*. It is a significant departure from the FCC's practice in prior auctions, and in the context of the Incentive Auction proceeding – which will be by far the most complex auction that the FCC has ever held – will only serve as a disincentive for many small and rural service providers who are considering participation.

In addition to the being overly broad, the Blooston Rural Carriers believe the "exclusive bidder" rule was adopted without sufficient notice to the small companies whose ability to participate in the Incentive Auction will be most harmed by this prohibition. It is respectfully submitted that commenters in this proceeding who supported the prohibition did so in the context of discussing multiple commonly controlled applicants and/or applicants with a common investor (*e.g.*, like DISH Network Corp, Northstar Wireless and SNR Wireless). No commenters indicated there was potential for harm where an individual who does not have any ownership interests in any applicant serves as an authorized bidder for more than one applicant if the applicants are not eligible to bid for any licenses in the same or overlapping geographic markets.

As the Commission is aware, many small and rural service providers have come to rely on their company's established FCC counsel to manage their auction participation and to carry out their bidding instructions. In this way, companies that do not have a large enough staff to devote one or more employees to full-time auction participation are able to secure representation from counsel with whom they have an established relationship, who has fiduciary and ethical obligations to avoid conflicts of interest and who is in a position to provide these services at an affordable cost to multiple clients in cases where those clients' geographic areas of interest are separate and non-overlapping.

The Blooston Rural Carriers respectfully request that the Commission modify the wording of Rule Section 1.2105 (a)(2)(iii) or otherwise clarify that individuals who do not have ownership interest in any auction applicant and who are employed as bidding agents are not precluded from providing similar services to multiple auction applicants to the extent that these entities do not have eligibility to bid for licenses in the same or overlapping geographic markets. Alternatively, the Commission should create an exception to the exclusive bidder prohibition that is applicable to rural carriers.

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**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION OF
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The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its rural and independent telephone and wireless service provider clients (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for clarification and/or reconsideration of the Commission's *Report and Order*, FCC 15-80, released July 21, 2015, in the captioned proceeding (the "*DE Report and Order*"), and the wording of new Rule Section 1.2105 (a)(2)(iii), which appears to adopt a bright line prohibition on any person serving as an authorized bidder for more than one auction applicant. The Blooston Rural Carriers submit that this prohibition as drafted is overly broad because it prohibits an individual attorney or consultant from serving as an authorized bidder for multiple clients even when those applicants are not affiliated, share no common ownership, and are not qualified to bid for licenses in the same or overlapping geographic areas, therefore posing no realistic threat of

collusion or other anti-competitive harm. Moreover, adoption of this bright-line rule is a significant departure from prior practice, and the Commission failed to address legitimate concerns raised by the Blooston Rural Carriers in their March 6, 2015 reply comments that:

“the Commission must be careful not to adopt restrictions that are overly broad and limit the ability of small businesses and rural telephone companies to rely on counsel and consultants when participating in future auctions.”¹

There has been no suggestion by any commenter that allowing an attorney to bid for multiple distinct and non-competing applicants could pose any anti-competitive threat. To ensure that small businesses and rural telephone companies are able to participate with confidence in upcoming auctions and are not precluded from relying on counsel with whom they have worked in past auctions, the Blooston Rural Carriers respectfully request that the Commission modify the wording of Rule Section 1.2105 (a)(2)(iii), and clarify its interpretation of other Part 1 competitive bidding rules, so that professionals who have developed an expertise in the FCC’s auction processes may continue to help their clients navigate what is expected to be the most complex auction in history, in narrowly defined circumstances that pose no threat of harm to other bidders or to the integrity of the auction process. A reading of the record indicates that commenters were focused on this more narrow reading of the bidding restriction. In support hereof, the following is shown:

I. An Absolute Ban on Bidding for Multiple Applicants Would Ignore the Potential Harm of its Authorized Bidder Restriction on Small Businesses and Rural Carriers

The Blooston Rural Carriers respectfully submit that an absolute ban on bidding for multiple applicants would fail to adequately consider the potential harm to small businesses and rural carriers. The restriction in question began as a proposal in NPRM comments filed by T-

¹ Reply Comments of the Blooston Rural Carriers, WT Docket 14-170 (filed March 30, 2015) at p. 10.

Mobile,² and was adopted without any critical discussion at Paragraph 200 of the *DE Report and Order*. The *DE Report and Order* cites to a handful of comments and reply comments in the proceeding as “generally agree[ing]” with the proposal,³ but none of these commenters specifically state that such prohibition is necessary even where the applicants have no common ownership and are not eligible to bid in any of the same geographic areas. The *Part 1 PN* reply comments of the Competitive Carriers Association *mention* the T-Mobile proposal alongside a “refinement of this proposal” offered by Sprint that would “prohibit entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid in licenses in the same geographic area.”⁴ CCA doesn’t say that it would *prefer* one of these proposals over the other, but rather it urges the Commission “to consider all these measured approaches that are directed at improper behavior.”⁵ Thus, CCA’s recommendations are for the Commission to consider “measured approaches” (not blanket prohibitions) and is desired ends relate to curbing “improper behavior” (not regulating situations where there is no realistic potential for misconduct). The T-Mobile *Part 1 PN* Comments mention their proposed limitation without discussion in a bullet point at page 2, then, in Section III of the comments (addressing auction participation by *commonly controlled* entities); T-Mobile discusses a proposal for a certification requirement applicable to individuals or entities that are listed as disclosable interest holders in more than one short-form application, adding “[t]he Commission also should require that authorized bidders on a short-form application should be unique to that applicant – meaning that an individual would be prohibited from serving as an authorized bidder for more than one

² T-Mobile *Part 1 NPRM Comments* at p. 9.

³ The Commission cites to the following comments as generally agreeing with the proposal: “CCA *Part 1 PN* Reply at 13-14; T-Mobile *Part 1 PN* Comments at 2, 10-11. *See also* C Spire *Part 1 NPRM* Reply at 3.”

⁴ CCA *Part 1 PN* Reply at 13-14

⁵ *Id.*

auction participant.”⁶ Thus, T-Mobile’s own comments suggest that allowing an individual to bid for multiple applicants is a problem that arises in a context where there is common ownership or control. Moreover, T-Mobile’s comments go on to recognize “[t]here is no need to prohibit joint bidding arrangements that do not cover the same geographic markets, however, since there is not the same risk of harm to the auction process or distortion of demand.” Finally, the *Part 1 NPRM* reply comments of C Spire also focus on issues raised by applicants that have common ownership, and urge the Commission “to consider additional restrictions preventing an investor who holds an interest in multiple auction participants from directing or participating directly in the bidding of more than one of those participants, regardless of whether there is common control of the bidding entities.”⁷ In light of the more limited nature of the restriction discussed in the comments cited by the Commission as supporting the new bidder rule, the Blooston Rural Carriers urge the Commission to clarify Section 1.2105 (a)(2)(iii), so as to recognize that there is no potential for harm where an individual who does not have any ownership interests in any applicant serves as an authorized bidder for more than one applicant if the applicants are not eligible to bid for any licenses in the same or overlapping geographic markets.

II. Small Bidders and Rural Telephone Companies Have Come to Rely on Attorneys Other Professionals to Manage their Auction Participation.

In all past auctions, rural telephone companies (that typically seek bidding eligibility for a few licenses in a particular state) have been able to rely on their company’s established FCC counsel to monitor an auction proceeding and to bid, as necessary, pursuant to the applicant’s express instructions. In this way, small companies that do not have a large enough staff to devote one or more employees to full-time auction participation are able to secure representation

⁶ T-Mobile *Part 1 PN* Comments at p 10.

⁷ C Spire *Part 1 NPRM* Reply Comments at p. 3 (*emphasis added*).

from a trusted advisor with whom they have an established relationship, who has a fiduciary obligation to avoid conflicts of interest and who is in a position to provide these services at an affordable cost to multiple clients in cases where those clients' geographic areas of interest are separate and non-overlapping. With a limited pool of experienced attorneys available to assist the rural telephone industry with auction participation, and even fewer of these qualified individuals in a position to devote their full work day for what could be several months of monitoring auction bids on a round-by-round basis, many rural carriers have used their long time attorneys or other professionals as primary bidders, or as back-up bidders who are able to fill in for the primary bidder in the event they have obligations that can't be scheduled around the auction (*e.g.*, attending state public service commission meetings, preparing Title II compliance reports, responding to service outage emergencies, etc.) or if unforeseen circumstances should arise (*e.g.*, inclement weather, caught in traffic, disruption in Internet access, family emergencies, etc.). Ensuring that an applicant has bidders in multiple locations and redundant computer systems in place is vital in the context of a competitive bidding proceeding, because missing even a single round in an FCC auction can have disastrous consequences (*e.g.*, resulting in a reduction in bidding eligibility and possible permanent disqualification from the auction). This need for redundancy is even more important in the context of the Incentive Auction, because the Commission has adopted auction procedures that will require bidders in the forward auction to reconfirm their bids in every round, and will not provide bidders with any activity rule waivers.⁸

⁸ See, Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination. Qualifying to Bid and Bidding in Auctions 1001 (Reverse) and 1002 (Forward); AU Docket No. 14-252, *et. al.*, (*Incentive Auction Procedures Public Notice*), at Para 213. "For these same reasons, we do not provide for activity rule waivers to preserve a bidder's eligibility in the forward auction."

III. The Commission Did Not Provide Adequate Justification for a New Rule that Limits the Ability of Individuals to Serve as Authorized Bidders for Multiple Non-Competing Applicants

The *DE Report and Order* modified Rule Section 1.2105 (a)(2) by adding a second sentence that reads, “No person may serve as an authorized bidder for more than one auction applicant.” This prohibition is absolute, and does not leave room for potential auction participants to rely on individual attorneys that they have used in prior FCC auctions, even if the other bidder is a wholly independent entity that is not seeking eligibility to bid for licenses in any of the same or overlapping geographic areas, and there is no potential for abusive bidding or other anticompetitive conduct. Thus, the rule is overly broad, because it prohibits an established industry practice that has no potential for anticompetitive harm. The rule was adopted without sufficient notice to the small companies whose ability to participate the Incentive Auction will be most harmed by this prohibition.

In the *Notice of Proposed Rulemaking* in this proceeding,⁹ the Commission proposed numerous changes to its designated entity and Part 1 competitive bidding rules, but it failed to seek comment on changes to the rules that would limit the ability of individual attorneys to bid for multiple non-competing applicants. To be sure, the Commission proposed to codify an established competitive bidding procedure that prohibits the same individual or entity from being the applicant in more than one short-form application in a specific auction (*i.e.*, the “single application rule”),¹⁰ and it proposed a new rule that would prevent entities that are exclusively controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form

⁹ See Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170, *Notice of Proposed Rulemaking*, 29 FCC Rcd 12426 (2014) (*Part 1 NPRM* or *NPRM*).

¹⁰ *Part 1 NPRM* at Paras. 82, 98-106.

application (the “commonly controlled applicant rule”). But these proposals were discussed in a portion of the *NPRM* that was focused on limiting the potential for anticompetitive bidding behavior by commonly controlled entities. The proposal in no way implicated the ability for companies that are wholly-independent and non-competing to use the same attorney as an agent to monitor an auction and to place bids, as necessary, on their behalf and pursuant to their express instructions. The concerns that the Commission sought to address through these proposals were “to improve the transparency and efficiency of the auction process, by making clearer who the qualified bidders actually are and ensuring against the potential for anticompetitive auction behavior.”¹¹ Limiting the ability for the same individual or entity to file more than one short-form application serves legitimate ends because it protects the Commission against the burden of duplicative, repetitious or conflicting applications,¹² and it addresses potential concerns that duplicate filers may be able to manipulate the auction process—using, for example, identical bids or multiple activity waivers—to pursue potentially anticompetitive ends.¹³ However, neither of these concerns are raised by allowing an outside professional to serve in the capacity as a bidding agent for multiple *non-affiliated* applicants that are *not eligible to bid in any of the same or overlapping geographic areas*. Likewise, limitations on the ability of entities that are under the common, exclusive control of a single individual or set of individuals (*i.e.*, a single individual or same set of individuals is the exclusive controlling interest of more than one entity) makes sense because applicants under the common control of a single individual or set of individuals may coordinate their bidding actions in ways not available to a single bidder. As the Commission observed:

¹¹ *Id.*, at Para. 101.

¹² *Id.*, at Para. 102.

¹³ *Id.*

“Even when applicants are not identical, if more than one applicant is under the exclusive control of a single individual or set of individuals, such common control may allow the controlling individual or set of individuals to attempt to gain advantages in the bidding process based on certain coordinated bidding actions (e.g., tied bids, activity waivers).¹⁴

Thus, the Commission’s focus has been on the potential for harm where there is common control of more than one applicant. And the Commission stated in unambiguous terms that “[i]n defining the entities that would be subject to this rule, we propose to use the concepts of “control” or “controlling interest” from section 1.2110 of the Commission’s rules.”¹⁵ This rule would not apply to individuals who are not deemed “controlling interests” of an applicant, such as attorneys, consultants and other professionals that have been hired by the applicant to assist in the bidding process, and if necessary, to place bids on behalf of the applicant. The Commission’s discussion throughout the rest of the “commonly controlled entities” section of the NPRM focused on potential damage to the transparency of the auction process that was presented by commonly controlled applicants that are eligible to bid in the same or overlapping geographic license areas. But these are not valid concerns with respect to individuals who are serving in the role of a bidding agent for multiple applicants where there is no common ownership or control, and these concerns are even further removed when these multiple applicants are not eligible to bid in any of the same or overlapping geographic license areas.

The *Part 1 NPRM* also included various proposals with respect to the Commission’s policies and rules governing joint bidding.¹⁶ In this regard, the Commission proposed to retain its current rules regarding joint bidding arrangements among non-nationwide providers and to prohibit joint bidding arrangements among nationwide providers. The Commission’s goal in

¹⁴ *Id.*, at Para. 103.

¹⁵ *Id.*

¹⁶ *Part 1 NPRM* at Paras. 107-138.

reviewing its joint bidding rules was “to ensure that they preserve and promote competition in the mobile wireless marketplace and facilitate competition among bidders at auction, while providing potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible.”¹⁷ Significantly, these proposals did not in any way view the use of a common individual as an authorized bidder as creating any tacit “agreement, arrangement or understanding” between two applicants. Instead, the Commission clarified that, for purposes of this proceeding, it would define “joint bidding and other arrangements” to include “any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to post-auction market structure or operation.”¹⁸ Use of a common individual acting in the capacity of a bidding agent pursuant to instructions from two or more entities that have distinct ownership and no overlapping licenses or geographic markets where they are eligible to bid cannot be interpreted as falling into any of these categories that amount to “joint bidding” under the Commission’s Rules. To justify a modification of Rule Section 1.2105 (a)(2)(iii) on this basis would be a significant departure from past precedent without adequate explanation or justification.

With respect to application and certification procedures under Rule Section 1.2105, the *Part 1 NPRM* only proposed to modify paragraph (a)(2)(xi) to narrow the scope of the “former defaulter rule,” and paragraphs (b)(1) and (b)(2) to clarify how it would process short-form applications that did not contain all the required certifications, and multiple applications filed by an individual or applications filed by commonly controlled entities that were eligible to bid for any licenses in the same or overlapping geographic areas. Thus, the *Part 1 NPRM* contained no

¹⁷ *Id.*, at Para. 107.

¹⁸ *Id.*, at Para. 122.

proposals to prohibit individuals from serving as an eligible bidder for multiple applicants when those applicants are not affiliated, share no common ownership, are not qualified to bid for licenses in the same or overlapping geographic areas.

Following the close of the AWS-3 auction (a.k.a. “Auction 97”), and in the midst of controversy surrounding alleged anti-competitive and coordinated bidding practices by DISH Network Corp (“DISH”) and certain Designated Entities (“DEs”) that were substantially owned by DISH as a “non-controlling investor” that had entered into pre-auction agreements, the Commission issued a *Public Notice* requesting further comment on updating the Part 1 competitive bidding rules.¹⁹ With respect to commonly controlled entities, the Commission noted that commenters largely supported the Commission’s proposal, though some urged the Commission to take a step further and consider whether to apply the proposals to entities with common, non-controlling interests (*i.e.*, the scenario presented by DISH and the DISH DEs in Auction 97). In this regard, T-Mobile raised concerns about “the potential for coordinated bidding behavior by applicants linked by common attributable interests,” noting that these entities would have unfair advantages in an auction and could be in a position to manipulate bidding.²⁰ Other commenters suggested that allowing an entity with ownership in more than one auction bidder that exceeds a certain percentage (e.g., 50% or more) promotes collusion,²¹ and T-Mobile recommended that the Commission “adopt a requirement in addition to its existing rules that individuals or entities listed as disclosable interest holders on more than one short-form application certify that they are not, and will not be, privy to, or involved in, the bidding strategy

¹⁹ See Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules, *Public Notice*, FCC 15-49 (*rel.*, April 17, 2015).

²⁰ February 20, 2015 Comments of T-Mobile USA, Inc., WT Docket No. 17-170 (“T-Mobile Comments”) at p. 3.

²¹ Spectrum Financial Reply at 3.

of more than one auction participant.”²² A common thread that unites these concerns about the potential for collusion and a lack of transparency in the bidding process is the existence of common ownership interests, which creates the ability and incentive to engage in coordinated bidding activity. The DISH DEs demonstrated the very real potential for bidders with shared non-controlling interests to skew the auction process through coordinated bidding. T-Mobile’s suggestion, in the very next breath, that the Commission also require authorized bidders on a short-form applicant be unique to that applicant – is overly broad and presupposes that all situations in which an individual serves as an authorized bidder for more than one applicant create the potential for abusive bidding. Existing FCC policies and rules already prohibit individuals from serving as an authorized bidder for applicants that are eligible to bid for licenses in the same or overlapping geographic markets, and the Blooston Rural Carriers have no objection to the Commission codifying this policy in Part 1 auction rules for the sake of clarity. However, adopting a bright-line prohibition that prevents rural telephone companies and other small entities from utilizing trusted and experienced outside advisors, and for these advisors to be precluded from providing similar services to other clients in instances that raise no competitive concerns, goes far beyond the scope of rules proposed by the Commission and could preclude many small bidders from participating in the Incentive Auction. The Commission provided no explanation in its *DE Report and Order* for this significant departure from prior practice, despite the concerns raised by the Blooston Rural Carriers in their Reply Comments about the need to be able to use their established counsel. The Blooston Rural Carriers respectfully request that the Commission modify the wording of Rule Section 1.2105 (a)(2)(iii) and otherwise clarify that individuals who do not have ownership interest in any auction applicant and who are employed as bidding agents are not precluded from providing similar

²² T-Mobile Comments at p. 9.

services to multiple auction applicants to the extent that these entities do not have eligibility to bid for licenses in the same or overlapping geographic markets. If the Commission is not willing to implement this clarification of the new Designated Entity rules across the board, it should create an exception for rural carriers. The Commission can take official notice that (1) the Incentive Auction will by far be the most complex procedure in the history of spectrum auctions; (2) many key aspects of the auction rules and procedures are becoming public late in the game and with less time than usual for planning and implementation; and (3) there are a limited number of attorneys who represent rural carriers, and who have worked closely with their clients throughout prior spectrum auctions. These attorneys have developed a detailed understanding of their clients' spectrum needs, auction applicant structures and risk tolerance over the years. Just as there are limitations on an attorney's withdrawal from a client matter because of the potential for prejudice to the client's interests, the Commission should not in essence *force* a withdrawal of counsel from the service of small, rural carriers where not necessary in the context of their bidding.

CONCLUSION

In a proceeding to refine and improve the Commission's DE and competitive bidding rules in advance of an auction that is historic in terms of complexity and importance to the wireless industry, it is understandable that the Commission would want to do its best to close perceived loopholes in the rules and ensure the integrity and transparency of the auction process. However, the Commission also wants to encourage robust auction participation by and competition from small businesses and rural telephone companies. Restricting the ability of attorneys and other professionals who have traditionally worked with these smaller entities to provide a complete range of bidding and auction support services to applicants that do not share

common owners or investors and that have not sought eligibility to bid for licenses in any of the same or overlapping geographic areas guards against no potential harm and is only likely to limit the ability of small and rural carriers to participate in the Incentive Auction and to bid with confidence.

Respectfully submitted,

THE BLOOSTON RURAL CARRIERS

A handwritten signature in black ink, appearing to read "D. Cary Mitchell". The signature is fluid and cursive, with a large initial "D" and "M".

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